STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

ELAINE ALVINI, et al.,	:	
Charging Parties,	:	
v.	:	Review of the Decision Below
COLONIAL SCHOOL DISTRICT, COLONIAL PARAPROFESSIONAL ASSOCIATION, and COLONIAL FOOD SERVICE WORKERS ASSOCIATION,	:	U.L.P. No. 92-03-073 A
Respondents.	:	

BACKGROUND

The Public Employment Relations Board (hereinafter "PERB") adopts the "Background", "Stipulated Facts" and "Issue" as outlined in the Executive Director's Decision of March 8, 1993. Portions of those sections will be repeated below for the purpose of continuity only.

The Charging Parties are "public school employees" within the meaning of section 4002(m) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (hereinafter referred to as "PSERA"). Although included in the bargaining units represented by either respondent Colonial Food Service Workers Association or respondent Colonial Paraprofessional Association, the Charging Parties are not members of these labor organizations.

The Colonial School District is a "public school employer" within the meaning of 14 Del.C. section 4002(n). The Colonial Food Service Workers Association and the Colonial Paraprofessional Association are each "exclusive bargaining representative" within the meaning of 14 Del.C. section 4002(i).

In April, 1992, the Colonial Food Service Workers Association and the Colonial Paraprofessional Association filed individual suits against bargaining unit members

who had chosen not to join the labor organizations to collect a "fair share" representation fee authorized by the collective bargaining agreements between the organizations and the Colonial School District. On June 6, 1992, the National Right to Work Foundation filed an unfair labor practice charge on behalf of those employees challenging the legality of the fee under the PSERA. The Charge alleged that the District's agreement to the contractual language interfered with, restrained or coerced the employees in the exercise of the rights guaranteed by the PERSERA at §4007(a)(1) and (b)(1); that it amounted to employer assistance in the administration of the labor organizations in violations of §4007(a)(2); and that it encouraged membership in the Associations by discrimination with respect to this condition of employment in violation of §4007(a)(3).

14 Del.C. sections 4007 (a)(1), (2) and (3) provide:

> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
>
> (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
>
> (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

The complaint further charged the Respondent Associations with violating section 4007(b)(1), which provides:

> (b) It is an unfair labor practice for a public school employee or for an employee organization or its designated representative to do any of the following:
>
> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

The District filed its Answer to the charge on June 8, 1992, declining to participate further in the proceedings based upon the "hold harmless clause" contained in the disputed contractual provisions.

A hearing in this matter was held on November 11, 1992. Post-hearing briefs were filed by the respective parties. The Executive Director's decision was issued on March 3, 1993.

On March 9, 1993, a "Charging Parties' Motion for Review" was filed with the PERB together with a request for the opportunity to present oral argument and to file briefs in support of the request for review. The PERB, on April 13, 1993, granted a thirty day period for the filing of briefs on appeal. A briefing schedule was agreed upon culminating with the final brief being filed May 19, 1993.

DECISION

After a complete review of the entire record, including 14 Del.C. Chapter 40, the Public Employment Relations Board upholds the Executive Director's decision of March 3, 1993, in its entirety.

The Executive Director's decision fully sets forth the parties' positions in this dispute (pp. 6-8) and need not be repeated here. While the additional briefs filed after that decision are helpful, they do not provide any new facts or arguments that alter the March 3rd decision.

In his decision (p. 8), the Executive Director discusses whether a "fair share agreement" which impacts public school staff is legal under the Public School Employment Relations Act. The history of the contractual language in the Delaware Courts is also examined. In Colonial Food Service Workers' Assn., v. Board of Education (Del.Ch., C.A. No. 8269 (Oct. 8, 1987)), Vice Chancellor Hartnett ruled that the disputed language was not ambiguous. He stated,

> ... The language must be judged by a reasonable standard... The plain meaning of the words is that the Association can take any action to collect a representation fee. "Any action" clearly includes the entering of a suit.

Continuing, Judge Hartnett observed that,

> When the language of the Agreement as a whole is read, it can

> have only one reasonable interpretation - that a food service employee would not have to join the union or pay the representation fee as a condition of employment. He, therefore, could not be fired for failing to join the union or pay the representation fee but that the Association had the authority to establish a service charge to non-members (a representation fee) and that the Association could use any lawful methods to collect the fee but that the Board would have no part in the collection of it. (Emphasis added)
>
> Cases arising under the National Labor Relations Act have precedential value in labor relations matters where a Delaware statute follows the federal act. City of Wilmington v. Wilmington Firefighters Local 1590 (Del.Supr., 365 A.2d 720 (1978)). The courts have consistently upheld the legality of representation fees to be paid by non-members of a union and their collection by the union by any legal means... (Citations omitted)

Thus, the Executive Director stated in his decision (p. 9),

> ... Because the essential terms of the disputed provisions, "representation fee" and "condition of employment" have well recognized meanings in labor law, the Vice-Chancellor reasoned they would not have been misunderstood by the negotiators. Consequently, he held that because a meeting of the minds had occurred, a binding agreement came into existence when the original agreement was ratified by the Association...

On February 19, 192, in Colonial Food Service Workers Association v. Hicks, et al., (Del.Super., C.A. No. 90C-FE-63) Judge Babiarz of the Superior Court of the State of Delaware ruled that 19 Del.C. Chapter 13, the applicable law at the time the suit was originally entered, did not prohibit agency shop arrangements. He also ruled that the defendants could not reargue the issue of the Association bringing suit to collect unpaid fees from non-members since the Chancery Court had decided the identical issue in CFSWA v. Bd. of Education (Supra).

A key element in deciding this case involves the question of whether 14 Del.C. §4003(1), which controls this case, established different criteria for determining "condition of employment" from that determined by the Delaware Courts in under 19 Del.C. Chapter 13. Our reading of the statue agrees with the Executive Director where he states:

> ... parallel to 19 Del.C. Chapter 13, the PSERA does not expressly grant the right to all public school employees to refrain from these protected activities. It does, however, create a limited and express exception. Certified professional employees are protected from agreements which require them to either join or financially support employee organizations as a condition of their employment. Because this exception is so clearly and narrowly crafted, it is apparent that the Legislature's intention was that all employees other than certified professionals could be subject to agreements which require either membership or financial support of an employee organization as a condition of employment. Further, when the PSERA was amended on July 18, 1990, the synopsis of the amendment as it related to §4003(1) read:
>
> > Section 4 of this Act maintains the status quo for locally bargaining union security and fair share provisions. (HS1 for HB541)
>
> Consistent with the decision in Hicks (Supra), the status quo which was preserved was that certificated professional employees could not bargain union security or fair share provisions as a condition of employment, while all other support employees could...

This Board firmly believes that where the Delaware Courts have interpreted statutory language which parallels that of the PSERA, we will look to their logic for guidance and adopt their reasoning for its precedential value. The Delaware General Assembly could have granted the "right to refrain" from the organizations activities enumerated in the statute by simply including such language in the PSERA. In light of the absence of the "right to refrain" language in the PSERA, the Executive Director's reliance upon the synopsis to rule that 14 Del.C. Chapter 40 was not intended to be read differently than 19 Del.C. Chapter 13 is appropriate and accordingly upheld.

The Board adopts the Executive Director's ruling that paraprofessional employees are not "certified professional employees" as that term is used in 14 Del.C. §4003(1). Section 4003(1)'s limited exception regarding "certified professionals" reveals the General Assembly's intention to allow school employee labor organizations to require non-certified professionals to participate in specified organizational activities as "conditions of employment". Paraprofessionals, which

the Charging Parties have defined as "aides who interact with children" are not certified professional employees as that term is used in the exception created by §4003(1).

The March 3, 1993, decision of the Executive Director is, accordingly, wholly affirmed.

IT IS SO ORDERED.

/s/ Arthur A. Sloane
ARTHUR A. SLOANE, Chair

/s/ Henry E. Kressman
HENRY E. KRESSMAN, Member

/s/ R. Robert Currie, Jr.
R. ROBERT CURRIE, JR., Member

DATED: June 7, 1993